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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ESMAIL ENAYAT,

Plaintiff and Appellant,

v.

ROUZBEH ROSS MISSAGHI et al.,

Defendants and Respondents.

B260861

(Los Angeles County
Super. Ct. No. BC466654)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Michael Shemtoub for Plaintiff and Appellant.

Rastegar Law Group, Farzad Rastegar and Thomas S. Campbell for Defendants and Respondents.

I. INTRODUCTION

Plaintiff, Esmail Enayat, appeals from a November 13, 2014 judgment and March 10, 2015 attorney fee order. The judgment was entered after a court trial on causes of action in a complaint and cross-complaint. The trial court found in favor of defendants, Rouzbeh Ross Missaghi, Super Collision Center, and Beverly Euro Motors, Inc., on plaintiff's first amended complaint. As for defendants' cross-complaint, the trial court ruled for Mr. Missaghi on one cause of action. The trial court found for plaintiff on the other three causes of action in the cross-complaint. The trial court also found defendants were the prevailing party and awarded them attorney's fees in an amount to be determined on subsequent motion. Following entry of judgment, defendants moved for attorneys' fees. The trial court awarded attorney's fees to defendants under Code of Civil Procedure section 1032 and Civil Code section 1717.

Plaintiff challenges both the November 13, 2014 judgment and the March 10, 2015 attorney fee order. Plaintiff argues he should be relieved from the judgment on an attorney abandonment theory. In addition, plaintiff asserts Civil Code section 1717 is inapplicable because the lease was replaced by a settlement agreement. Plaintiff also challenges the trial court's prevailing party determination. We affirm the judgment and order awarding attorney's fees to defendants.

II. BACKGROUND

A. First Amended Complaint

On August 2, 2011, plaintiff filed a complaint against defendants. On August 3, 2011, plaintiff filed a first amended complaint. The first amended Judicial Council form complaint contains two causes of action labeled "Intentional Tort." The first intentional tort cause of action alleges acts of waste were committed on the property. This occurred when "defendant" vacated the premises which were owned by plaintiff. Accompanying the first cause of action is a Judicial Council form exemplary damages attachment.

The second intentional tort cause of action is for conversion. The basis of the foregoing claims is as follows. On November 15, 2010, defendants agreed to vacate the premises by January 7, 2011. Before moving out, defendants allegedly damaged the property. The first amended complaint alleges defendants: pulled out electrical wiring; removed light fixtures; broke windows; removed inner doors; removed the compressor and other equipment; and destroyed two outside lifts.

B. Cross-Complaint

On October 26, 2012, defendants filed a cross-complaint against plaintiff for: slander per se; intentional and negligent interference with prospective economic advantage; and breach of a settlement agreement. The cross-complaint describes the parties' prior litigation and settlement agreement. On November 20, 2000, plaintiff leased property to Mr. Missaghi. Beginning on January 1, 2001, the parties operated a body shop on the property. On March 4, 2003, a dispute arose between the parties as to the ownership of the body shop and the lease's terms. On April 2, 2004, plaintiff sued defendants. On August 12, 2004, defendants filed a cross-complaint against plaintiff. On May 25, 2007, the parties entered into a written settlement agreement and release.

The cross-complaint alleges: plaintiff made numerous false and defamatory statements about defendants; plaintiff's defamatory statements were slander per se; plaintiff intentionally and negligently interfered with Mr. Missaghi's prospective economic advantage thereby causing reputational harm; plaintiff breached the settlement agreement by suing for property damages that were already settled and released; and plaintiff breached the settlement agreement by failing to mediate the parties' dispute before the Honorable David L. Minning. Defendants requested attorney's fees and costs pursuant to paragraph 14 of the settlement agreement incurred in the instant case.

C. Statement of Decision

The action was tried before the trial court for three days in June 2014. Plaintiff proceeded to trial on the intentional tort claim while defendants tried the issues raised by the cross-complaint. During the actual trial, plaintiff was represented by Jance Marshall Weberman. On September 30, 2014, the trial court issued its statement of decision. The trial court found Mr. Missaghi rented the premises from plaintiff under a May 27, 2007 lease agreement. In a prior litigation, the parties stipulated that defendants' rights under the lease agreement were forfeited on January 7, 2011. Defendants agreed to vacate the premises on the same date. Plaintiff claimed upon taking possession of the property on January 7, 2011, he discovered it had been damaged. The trial court ruled plaintiff failed to meet his burden of establishing defendants were responsible for damage of the premise. The trial court found in favor of defendant on plaintiff's intentional tort cause of action.

As for the cross-complaint, the trial court ruled Mr. Missaghi failed to prove causation for the intentional and negligent interference with prospective economic advantage claims. In addition, the trial court found no evidence or argument was submitted on the claim for breach of written settlement agreement. But the trial court ruled in favor of defendant Missaghi on the slander per se cause of action. The trial court found: "To the extent [plaintiff's] comments about Mr. Missaghi impugn his profession; such comments would constitute Slander Per Se. However, the court finds that there is insufficient evidence of any actual damage on this claim and therefore awards only nominal damages of \$1.00."

The trial court awarded nominal damages to Mr. Missaghi and attorney's fees to defendants as the prevailing party. The statement of decision states: "The court finds in favor of defendants on plaintiff's complaint. [¶] The court finds in favor of cross-complainant Missaghi on his first cause of action for Slander Per Se and awards \$1.00. [¶] The court finds in favor of cross-defendants on the remaining causes of action in the cross-complaint. [¶] The court considers the litigation objectives and determines

defendant to be the prevailing party and awards costs and fees in an amount to be determined on subsequent motion.”

On November 13, 2014, the trial court entered judgment. Plaintiff filed a notice of appeal on December 3, 2014.

D. Attorney’s Fees Motion

On January 16, 2015, defendants moved for attorney’s fees pursuant to Code of Civil Procedure sections 1032, 1033.5 and Civil Code section 1717. Defendants argued they were entitled to attorney’s fees as the prevailing party under the lease and settlement agreement. In support of their motion, defendants submitted the lease and settlement agreement. On February 10, 2015, plaintiff began appearing in pro se. A substitution of attorney was filed and plaintiff, in pro se, replaced Mr. Weberman. On February 27, 2015, plaintiff, in pro. per., filed his declaration in opposition to defendants’ attorney’s fees motion.

On March 10, 2015, a hearing was held on defendants’ attorney’s fees motion. At the hearing, defendants’ counsel denied receiving plaintiff’s moving papers. The trial court awarded defendants \$152,791.50 in attorney’s fees pursuant to Code of Civil Procedure section 1032 and Civil Code section 1717.

III. DISCUSSION

A. Plaintiff Was Not Abandoned by Mr. Weberman

Plaintiff argues he should be relieved from the judgment on an attorney abandonment theory. As noted, on February 10, 2015, plaintiff and Mr. Weberman filed a substitution of counsel. Plaintiff began appearing in pro se. In general, an attorney’s negligence is imputed to his or her client. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898; *Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 205 (*Seacall Development*).) But where the attorney’s neglect amounts

to positive misconduct such that it obliterates the existence of the attorney-client relationship, courts will relieve the client from a judgment or dismissal of action. (*Ibid.*) In *Seacall Development, supra*, 73 Cal.App.4th at page 205, our colleagues in Division Seven explained: “What constitutes ‘abandonment’ of the client depends on the facts in the particular case. Even where abandonment is shown, however, the courts also consider equitable factors in deciding whether the dismissal of an action should be set aside. These factors include the client’s own conduct in pursuing and following up the case [citation], whether the defendant would be prejudiced by allowing the case to proceed [citation] and whether the dismissal was discretionary or mandatory [citation]. The courts must also balance the public policy favoring a trial on the merits against the public policies favoring finality of judgments and disfavoring unreasonable delays in litigation [citation] and the policy an innocent client should not have to suffer from its attorney’s gross negligence against the policy a grossly incompetent attorney should not be relieved from the consequences of his or her incompetence. [Citation.]”

Plaintiff argues he is entitled to relief based on an attorney abandonment theory. Plaintiff contends he did not receive a copy of the tentative and proposed statement of decision. He asserts his attorney should have objected to the prevailing party’s finding made in the proposed statement of decision and judgment. Further, plaintiff claims his attorney should have, but failed to, challenge defendants’ attorneys’ fee motion. In addition, plaintiff contends he did not sit on his rights because he opposed defendants’ motion for attorneys’ fees. But plaintiff also claims he appeared in pro per at the March 10, 2015 hearing and informed the trial court he had not received a copy of the attorney’s fee motion.

Plaintiff fail to show any evidence of abandonment by Mr. Weberman. Plaintiff argues he was never provided with copies of the statement of decision and the November 13, 2014 judgment. But plaintiff was aware of the judgment. Plaintiff, in pro se, filed a notice of appeal from the judgment on December 19, 2014. Furthermore, the judgment was attached to plaintiff’s civil case information statement filed on January 21, 2015. In addition, plaintiff included part of the statement of decision in his opposition to defendants’ attorneys’ fees motion. Moreover, the record does not support

plaintiff's contention that he was not served with defendants' motion for attorney's fees. Rather, the record shows defendants' counsel was not served with plaintiff's opposition papers. The March 10, 2015 hearing minute states: "Plaintiff Esmail Enayat appears on his own behalf in pro. per. [¶] The matter is called for hearing. [¶] Counsel for defendant indicates he was not served with the motion. [¶] Counsel is provided with the court's copy of the motion and the matter is put on brief second call. [¶] The matter is recalled for hearing. Counsel are heard." In sum, nothing in the record suggests plaintiff was abandoned by Mr. Weberman.

B. The Settlement Agreement Was Not a Novation of the Lease

The trial court awarded attorney's fees to defendants pursuant to Code of Civil Procedure section 1032 and Civil Code section 1717. Plaintiff argues Civil Code section 1717 is inapplicable because the lease was novated by the settlement agreement. Plaintiff's contention is without merit.

Novation is defined in Civil Code section 1530 as "the substitution of a new obligation for an existing" duty. (*Colley v. Chowchilla Nat. Bank* (1927) 200 Cal. 760, 769 (*Colley*).) A novation is a new agreement that supplants the original agreement and extinguishes the initial obligation. (*Colley, supra*, at pp. 769-770; *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431; Civ. Code, § 1531.) The parties must clearly intend to extinguish rather than merely modify the original agreement. (*Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 832 ["A novation requires an express release by the party entitled to comenforce a promise."]; *Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977 (*Howard*).) The party asserting novation has the burden of proof. (*Colley, supra*, at p. 770; *Howard, supra*, 220 Cal.App.3d at p. 977.)

There is insufficient evidence the May 25, 2007 settlement agreement is a novation that supplants and extinguishes the lease. The lease is dated May 25, 2007. The trial court could reasonably find the settlement agreement did not extinguish the lease when both were signed by the parties on the same date. Furthermore, both the lease and settlement agreement provide for attorney's fees to the prevailing party. Even assuming novation,

Civil Code section 1717 would still apply because the present action involves claims relating to the settlement agreement.

C. Defendants Are Entitled to Attorney's Fees

Plaintiff challenges the trial court's prevailing party determination. Plaintiff contends the trial court erred in finding defendants were the prevailing party under Civil Code section 1717 and Code of Civil Procedure section 1032. Plaintiff argues he is the prevailing party because he won three out of four causes of action on the cross-complaint.

Civil Code section 1717, subdivision (a) provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Further, Civil Code section 1717, subdivision (b)(1) states in relevant part, "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." An action is on the contract, within the meaning of Civil Code section 1717, if it involves a contract. (*Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal.App.4th 356, 366; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894; *Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455.)

The prevailing party determination is made by comparing the relief awarded on the claims with the parties' demands on those same claims and their litigation objectives. (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 876 (*Hsu*); *In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 577 (*Tobacco Cases I*)). In *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109, our Supreme Court explained, "If neither party achieves a complete victory on all the contract

claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.” (Accord, *Tobacco Cases I, supra*, at p. 577.) In determining litigation success, the courts are guided by equitable considerations. *Hsu, supra*, at p. 877; *Tobacco Cases I, supra*, 216 Cal.App.4th at p. 577.) The trial court’s prevailing party determination will not be disturbed on appeal absent a clear abuse of discretion. (*Tobacco Cases I, supra*, at p. 577; *Ajaxo Inc. v E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 58.)

Furthermore, under Code of Civil Procedure section 1032, a prevailing party is entitled to recover attorney’s fees awarded under Civil Code section 1717 as costs. (Code Civ. Proc., § 1033.5, subd. (c)(5).) Code of Civil Procedure section 1032, subdivision (b) provides, “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” Under Code of Civil Procedure section 1032, subdivision (a)(1), a complaint includes a cross-complaint. “Prevailing party” is defined in Code of Civil Procedure section 1032, subdivision (a)(4). That provision states in pertinent part: “‘Prevailing party’ includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the ‘prevailing party’ shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties” Allowable costs include attorney’s fees when authorized by contract, statute or law. (Code Civ. Proc., § 1033.5, subs. (a)(10) & (c)(5) [“Attorney’s fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 of this code as authorized by subparagraph (A) of paragraph (10) of subdivision (a).”]) The trial court’s prevailing party determination, along with its award of fees and costs, is reviewed for abuse of discretion. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332; *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 94.)

The trial court did not abuse its discretion in awarding attorney's fees under Civil Code section 1717 and Code of Civil Procedure 1032. Both the complaint and cross-complaint concern the rights and obligations of the parties under the lease and settlement agreement. In addition, both the lease and settlement agreement provide for attorney's fees. Paragraph 31 of the May 25, 2007 lease states: "If any party or Broker brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term, '**Prevailing Party**' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred" Paragraph 14 of the May 25, 2007 settlement agreement provides in pertinent part: "In the event of any litigation relating to this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs. This Agreement shall not be construed for or against any party."

Furthermore, the trial court did not abuse its discretion in finding defendants were the prevailing party. It is undisputed defendants prevailed against plaintiff on his first amended complaint. The trial court found in favor of defendants on plaintiff's intentional tort claims. As for the cross-complaint, neither party achieved complete victory. The trial court found in favor of Mr. Missaghi on his cause of action for slander per se but only awarded \$1 in nominal damages. But the trial court found in favor of plaintiff on the remaining causes of action in the cross-complaint. Because neither party achieved a complete victory on the causes of action in the cross-complaint, the trial court has broad discretion to determine which party prevailed on the contract. (*Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at p. 1109; *Tobacco Cases I*, *supra*, at p. 577.) Here, the trial court considered the

parties' litigation objectives and determined defendant to be the prevailing party. Plaintiff fails to show a clear abuse of discretion warranting reversal of the award of attorney's fees.

IV. DISPOSITION

The November 13, 2014 judgment and March 10, 2015 order on attorney's fees are affirmed. Defendants, Rouzbeh Ross Missaghi, Super Collision Center, and Beverly Euro Motors, Inc., shall recover their costs on appeal from plaintiff Esmail Enayat.

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TURNER, P. J.

We concur:

BAKER, J.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.